No. 90-898

Supreme Court, U.S.
FILED
DEC 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

JANICE G. CLARK, ORSCINI L. BEARD, EDDIE G. CRAWFORD, NORBERT C. RAYFORD, VOTER INFORMATION PROJECT, INC., LOUIS SCOTT, SYLVIA COOK, CONNIE SADLER, TOM NELSON AND ALBERT RICHARD,

Petitioners,

versus

CHARLES "BUDDY" ROEMER, GOVERNOR OF LOUISIANA; WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF LOUISIANA; FOX McKEITHEN, SECRETARY OF STATE OF THE STATE OF LOUISIANA, IN THEIR OFFICIAL CAPACITIES AS REPRESENTATIVES OF THE STATE OF LOUISIANA,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

ROBERT G. PUGH
Counsel of Record
ROBERT G. PUGH, JR.
Of the Law Firm of
PUGH, PUGH & PUGH
Commercial National Tower
Suite 2100
333 Texas Street
Shreveport, Louisiana 71101-5302
(318) 227-2270

(Additional Counsel On Inside Cover)

December 31st, 1990

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

JOHN N. KENNEDY
Special Counsel to the Governor
THOMAS A. CASEY
Executive Counsel to the Governor
Office of the Governor
Fourth Floor
State Capitol Building
Baton Rouge, Louisiana 70804
(504) 342-7015

Attorneys for and on Behalf of Charles "Buddy" Roemer Governor of Louisiana

MICHAEL H. RUBIN
CHRISTINA B. PECK
RUBIN, CURRY, COLVIN & JOSEPH
Ninth Floor
One American Place
Baton Rouge, Louisiana 70825
(504) 383-9000

Attorneys for the Louisiana District Judges Association

KENNETH C. DEJEAN
First Assistant Attorney General
Louisiana Department of Justice
Office of the Attorney General
Second Floor
State Capitol
Baton Rouge, Louisiana 70804
(504) 342-7014

Attorney for and on Behalf of William J. Guste, Jr. Attorney General of Louisiana

CYNTHIA YOUNG ROUGEOU
Special Counsel to the Secretary of State
State of Louisiana
Post Office Box 94125
Baton Rouge, Louisiana 70804
(504) 342-2065

Attorney for and on behalf of Fox McKeithen Secretary of State of Louisiana

QUESTION PRESENTED

Did Congress intend the word "representatives" as used in the Voting Rights Act of 1965, § 2(b) as amended, 42 U.S.C. § 1973, to include judges who are selected by a state judicial electoral process?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

A. The Louisiana State Court Judiciary System Involved in this Case 2

B. Prior Proceedings in this Litigation 3

ARGUMENT 7

I. THE FIFTH CIRCUIT CORRECTLY CONCLUDED IN *LULAC* THAT SECTION 2(b) OF THE VOTING RIGHTS ACT DOES NOT APPLY TO THE JUDICIARY 7

A. The *LULAC* Decision 7

B. The Genesis of § 2(b) of the Voting Rights Act 9

C. This Court has always held that Judges are not "representatives" 10

D. Other Federal Courts have held that Judges are not "representatives" 11

E. The Term "representatives" is not a Synonym for "elected officials" 14

F. The Fundamental Difference Between "representatives" and Members of the Judiciary is Deeply Rooted in this Country's History ... 17

G. The "Dichotomy" between Sections 2 and 5 of the Voting Rights Act 20

TABLE OF CONTENTS – Continued

Page

II. IF THE ONE-MAN, ONE-VOTE REQUIREMENT DOES NOT APPLY TO THE JUDICIARY, THE CONCEPT OF MINORITY VOTE DILUTION SET FORTH IN § 2(B) DOES NOT APPLY TO THE JUDICIARY 23

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES:

Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) 11, 29

Beer v. United States, 425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed. 629 (1976) 21

Brown v. Board of School Commissioners of Mobile County, 706 F.2d 1103 (11th Cir.), *affirmed*, 464 U.S. 1005, 104 S.Ct. 520, 78 L.Ed.2d 705 (1983) 10

Buchanan v. Gilligan, 349 F. Supp. 569 (N.D. Ohio 1972) 14

Buchanan v. Rhodes, 249 F. Supp. 860 (N.D. Ohio 1966), *appeal dismissed*, 385 U.S. 3, 87 S.Ct. 33, 17 L.Ed.2d 3 (1966), *vacated* 400 F.2d 882 (6th Cir. 1968), *cert. denied*, 393 U.S. 839, 89 S.Ct. 118, 21 L.Ed.2d 110 (1968) 13

Chandler v. Judicial Council, 398 U.S. 74, 90 S.Ct. 1648, 26 L.Ed.2d 100 (1970) 29

Chisom v. Roemer, 917 F.2d 187 (5th Cir. 1990), petition for cert. filed, 59 U.S.L.W. 3374 (U.S. Nov. 13, 1990) (No. 90-757) 2, 7, 8

Clark v. Edwards, 725 F. Supp. 285 (M.D.La. 1988) 4

Clark v. Roemer, 487 U.S. 1266, 109 S.Ct. 29, 101 L.Ed.2d 979 (1988) 4

Clark v. Roemer, 86-435 A (M.D. La. 1990) (three-judge court) Jurisdictional Statement filed, (U.S. Dec. 14, 1990) (No. 90-952) 7, 21

Consumer Products Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980) 15

TABLE OF AUTHORITIES – Continued

Page

Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951) 11

Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983) 15

Edge v. Sumter County School District, 775 F.2d 1509 (11th Cir. 1985) 10

Escondido Mut. Water Co. v. La Jolla Indians, 466 U.S. 765, 104 S.Ct. 2105, 80 L.Ed.2d 753 (1984) 15

Fahey v. Darigan, 405 F. Supp. 1386 (D.R.I. 1975) 14

Gilday v. Board of Elections of Hamilton County, 472 F.2d 214 (6th Cir. 1972) 14

Gomez v. City of Watsonville, 863 F.2d 1407 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1534, 103 L.Ed.2d 839 (1989) 10

Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) 11

Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), *affirmed*, 409 U.S. 807, 93 S.Ct. 43, 34 L.Ed.2d 68 (1972) 11, 12

Houston Lawyers' Association v. Mattox, sub nom., *Latin American Citizens Council #4434 v. Clements*, (5th Cir. 1990) (*en banc*) petition for cert. filed, 59 U.S.L.W. 3406 (U.S. Nov. 21, 1990) (No. 90-813) 7, 8

Jordan v. Winter, 604 F. Supp. 807 (N.D. Miss.), *affirmed*, 469 U.S. 1002, 105 S.Ct. 416, 83 L.Ed.2d 343 (1984) 10

TABLE OF AUTHORITIES – Continued

Page

Kail v. Rockefeller, 275 F. Supp. 937 (E.D.N.Y. 1967) 13

Ketchum v. Byrne, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135, 105 S.Ct. 2673, 86 L.Ed.2d 692 (1985) 10

Latin American Citizens Council #4434 v. Clements, 902 F.2d 293 (5th Cir. 1990) 8

Latin American Citizens Council #4434 v. Clements, 914 F.2d 620 (5th Cir. 1990) (*en banc*) ..... *passim*

League of Latin American Citizens, Inc. v. Mattox, sub nom., *Latin American Citizens Council #4434 v. Clements*, (5th Cir. 1990) (*en banc*) petition for cert. filed, (U.S. Dec. 14, 1990) (No. 90-974) 7

Martin v. Mabus, 700 F. Supp. 327 (S.D. Miss. 1988) 21

Mezvinsky v. Davis, 459 A.2d 307 (Pa. 1983) 22

Mobile v. Bolden, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980) 9, 25, 26, 27

New York State Association of Trial Lawyers v. Rockefeller, 267 F. Supp. 148 (S.D.N.Y. 1967) 13

Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) 12, 13, 24, 29

Romiti v. Kerner, 256 F. Supp. 35 (N.D. Ill. 1966) 14

Sagan v. Commonwealth of Pennsylvania, 542 F. Supp. 880 (W.D. Pa. 1982) 14

Stokes v. Fortson, 234 F. Supp. 575 (N.D. Ga. 1964) .. 12, 29

Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986) 5, 9, 22, 24, 25, 26, 27, 28, 29

TABLE OF AUTHORITIES – Continued

Page

United States v. Marengo County Commission, 731 F.2d 1546 (11th Cir.), *appeal dismissed & cert. denied*, 469 U.S. 976, 105 S.Ct. 375, 83 L.Ed.2d 311 (1984) 10

Velasquez v. City of Abilene, 725 F.2d 1017 (5th Cir. 1984) 10

Wells v. Edwards, 347 F. Supp. 453 (M.D. La. 1972) .. 11, 24

Wells v. Edwards, 409 U.S. 1095, 93 S.Ct. 904, 34 L.Ed.2d 679 (1973) 10, 23, 24, 27

Whitcomb v. Chavis, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971) 29

White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973) 9

Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) 28

CONSTITUTIONAL AND STATUTORY PROVISIONS:

United States Constitution Thirteenth Amendment 1

United States Constitution Fourteenth Amendment 1, 23, 26

United States Constitution Fifteenth Amendment 1, 23, 26

28 U.S.C. § 1331 1

28 U.S.C. § 1343 1

28 U.S.C. § 2201 1

28 U.S.C. § 2202 1

42 U.S.C. § 1973 [*Voting Rights Act*] ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 1983 1

42 U.S.C. § 1988 1

LA. R.S. 13:582 21

REGULATION:

28 C.F.R. Ch. 1 (7-1-89 Edition) § 5.56 22

RULES:

Supreme Court Rule 37 7

Fed.R.Civ. P. 23(a) and (b)(2) 1

Fed.R.Civ. P. 54(b) 6

LEGISLATIVE HISTORY:

S.Rep. No. 417, 97th Cong. 2d Sess. *reprinted in* 1982 U.S. Code Cong. & Admin. News at 177, 196 24

BOOKS:

A. Bickel, *The Supreme Court and the Idea of Progress* (1978 Yale University Press paperback edition) .19, 20

J. Ely, *Democracy and Distrust* (1980 Harvard University Press hardbound edition) 19

L. Friedman, *A History of American Law* (Simon & Schuster 1973 paperback edition) 19

E. Hickok, Judicial Selection: The Political Roots of Advice and Consent in *Judicial Selection: Merit, Ideology and Politics* (National Legal Center for the Public Interest 1990) 17

G. White, *The American Judicial Tradition* (1978 Oxford University Press edition) 17, 18, 19

STATEMENT OF THE CASE[1]

Petitioners brought this suit in the United States District Court for the Middle District of Louisiana as a class action pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. The class consisted of all black voters in the State of Louisiana. The suit challenged the at-large voting system for the election of District, Family Court and Courts of Appeal judges as being in violation of the 1965 Voting Rights Act, as amended, because, allegedly, the use of an at-large system results in a denial or abridgment of the right to vote of petitioners and all those similarly situated on account of race and color. Petitioners further asserted that several Louisiana statutory provisions had not been precleared by the Justice Department in contravention of the 1965 Voting Rights Act. Jurisdiction was based on 28 U.S.C. §§ 1331, 1343(3), (4) and 42 U.S.C. §§ 1973, 1973(c) and 1973(f).

The action sought declaratory and injunctive relief, 28 U.S.C. §§ 2201 and 2202. The cause of action was asserted to have arisen under Sections 2 and 5 of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973 and 1973(b) as amended in 1982, 42 U.S.C. §§ 1983 and 1988 as well as the Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution.

---

[1] Petitioners have presented the following Question:

> Does Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, apply to elections for state court judges?

Respondents present the following Question:

> Did Congress intend the word "representatives" as used in the Voting Rights Act of 1965, § 2(b) as amended, 42 U.S.C. § 1973, to include judges who are selected by a state judicial electoral process?

Respondents have never taken the position that Section 2 of the Voting Rights Act as initially enacted in 1965 was not applicable to the state judicial electoral process. The original Section 2 paraphrases the Fifteenth Amendment to the United States Constitution which binds everyone. It is the "results" test set forth in Section 2(b) which the respondents have always contended was not intended to embrace state judicial electoral processes.

A. The Louisiana State Court Judiciary System Involved In This Case.[2]

1. Courts of Appeal

There are five Courts of Appeal in Louisiana. Each of the five is divided into separate election districts. In those districts which contain more than one judge, the judges are elected through at-large voting from the entire district. Additionally, some of the circuits have judges who are elected at-large from the entire circuit. The appellate jurisdiction for these courts extends to all civil matters, all family and juvenile court matters, and substantially all criminal matters, except capital cases. At the time of the institution of this suit 42 judges were elected by district and 6 judges were elected at-large.

2. District Courts

There are forty District Courts in the State of Louisiana, together with both a Civil and Criminal District Court in the Parish of Orleans. Where the district contains more than one judge, the judges are elected at-large from the entire district. They are the primary courts of original jurisdiction for both civil and criminal matters, except in Orleans where these functions are separated. At the time of the institution of this suit 156 judges were elected to serve in the districts outside of Orleans Parish. In Orleans Parish there were 10 criminal district court judges and 12 civil district court judges.

3. Family Court

There is one Family Court in Louisiana. It is located in East Baton Rouge Parish. The three judges who preside over

---

[2] Additionally, Louisiana has Justice of the Peace, City, Municipal, Parish and Juvenile Courts, none of which are involved in this litigation. Louisiana also has a Supreme Court which is not involved in this litigation, but which has one of its districts under challenge in *Chisom, et al v. Roemer, et al.*, Docket Number 90-757, before this Court. A Petition for Certiorari is pending.

this Court are elected at-large from the entire parish. The Family Court has jurisdiction in East Baton Rouge Parish which generally encompasses matters pertaining to children under seventeen years of age, nonsupport, adoptions and matrimonial matters.

B. Prior Proceedings In This Litigation.

Early in the proceedings it was the district court's announced belief that

> [I]t needs to be repeated that this court views the problem if there is one, as a problem with the *system* – not individual judicial districts. Obviously there must be evidence that the system produces unlawful results and those results will appear in individual districts, but it is the *system*, not the judicial district, which produces the violation.

Unreported Minute Entry, United States District Court, Middle District of Louisiana, July 5, 1988.

As is customary in this type of litigation, this case was bifurcated so as to permit a liability phase, to be followed, if necessary, by a remedy phase. After a four day trial on liability, the district court issued the following Ruling on August 10, 1988:

> Because of my conviction that there are legally significant differences between judicial elections and legislative elections, it is my view that the remedy for Section 2 violations which are produced by the judicial election system, is to change the system, not to create sub-districts within district courts.

There followed the following Order of August 11, 1988:

> IT IS HEREBY ORDERED that the Governor, the Secretary of State, the Attorney General, and all other election officials, in their official capacities, as well as their attorneys, agents and representatives are hereby preliminarily enjoined from conducting any family court, district court, or court of appeal election which was scheduled for the October 1, 1988 (primary) and November 8, 1988 (general) elections, whether specifically enumerated or

> not and no certification shall issue to any candidate who qualified for any such election without opposition.

The district court ultimately held in the liability phase:

> Even though no specific Section 2 violation may exist in a particular district at this time, the system employed by the state will allow the creation of a violation, given time.
>
> The remedy is to revise the system – to cast about for alternative procedures under which black voters would have a better chance to elect judicial candidates of their choice. * * *
>
> Accordingly, the preliminary injunction previously issued will be made permanent and will be expanded to enjoin all family court, district court, and court of appeal elections until revisions in the electorial [sic] process are made. * * *
>
> This court can only repeat what it has said many times already. State district court districts are jurisdictional. They may not be redrawn, combined and manipulated in the same fashion as legislative districts. There are grave problems in attempting to create subdistricts within a district court jurisdiction. Tinkering with the districts is not the answer.

Clark v. Edwards, 725 F.Supp. 285, at 302-303, 307 (M.D.La. 1988).

On appeal the United States Court of Appeal for the Fifth Circuit vacated the Injunction. *Clark v. Roemer*, 88-3626 (5th Cir. 1988 unreported).

The petitioners then filed an Application for Stay with this Court on September 10th, 1988, in an attempt to vacate the Fifth Circuit Order. *Clark v. Roemer*, A-198, October Term, 1988. The Application for Stay was denied by Justice White. It was resubmitted to Justice Marshall who in turn submitted it to the full Court where it was denied. *Clark v. Roemer*, 487 U.S. 1266, 109 S.Ct. 29, 101 L.Ed.2d 979 (1988).

Respondents filed a Motion to Recall and Recast Findings of Fact and Conclusions of Law liability phase as entered on the 15th day of August, 1988. *Clark v. Roemer*, 725 F.Supp. 285 (M.D.La. 1988). This was based upon the district

court's conclusion that a systematic corrective measure should be the remedy for the violations found by the court, rather than a remedy which is district specific. The Motion set forth that neither the plaintiffs had shown nor had the court found violations in 18 of the district courts and in five of the courts of appeal districts. The Motion further asserted that neither the plaintiffs had shown nor had the court found evidence to support the three threshold criteria as established in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). This assertion involved 10 district courts, 8 courts of appeal districts, and 1 court of appeal district at-large.

After a trial on the Remedy Phase the district court issued its Findings of Fact and Conclusions of Law Remedy Phase. The Court stated:

> Throughout the course of this litigation, this court has marched to the solitary beat of its own drum, insisting that if Louisiana's system for selecting its judges produces violations of Section 2 of the Voting Rights Act, the remedy should be to revise the system, not to make adjustments in a few "guilty" districts which may well need adjusting again in the future. (See, for example, the views expressed at 725 F.Supp. at 294-295) None of the parties – plaintiffs, defendants, or intervenors – have joined the court's march. Each insists that, as a finding of a Section 2 violation is district specific, so any remedy must also be limited to districts in which specific violations have been found. For reasons stated later, the court concludes that it lacks the power to impose a systemic remedy upon the state and that any remedy is indeed limited to "guilty" districts. Both the parties and the appellate court need to be aware of this court's findings of fact. If, because of the Fifth Circuit's resolution of the Texas case, revisions in this court's conclusions of law are required, so be it. Accordingly, it is imperative that the state be permitted to fill judicial vacancies as rapidly as possible, in these districts in which no violation is found.

Clark v. Roemer, ___ F.Supp. ___ (M.D.La. 1990), not yet reported, Slip Opinion, page 3.

After discussing each district and granting respondents' Motion to Recall and Recast Findings of Fact and Conclusions of Law Liability Phase, the district court held:

> For the foregoing reasons, there will be judgment in favor of plaintiffs and against defendants making the injunction previously issued herein permanent as to the first, fourth, ninth, fourteenth, fifteenth, eighteenth, nineteenth, twenty-fourth and fortieth judicial districts and as to the Family Court for the Parish of East Baton Rouge and as to the Court of Appeal First Circuit, District 2. The injunction will be vacated as to all other judicial districts.

Id. at page 54.

On September 28th, 1990, the United States Court of Appeal for the Fifth Circuit rendered its *en banc* decision in the case of *League of Latin American Citizens Council #4434 v. William P. Clements, et al.*, 914 F.2d 620 (5th Cir. 1990) (*en banc*) [hereinafter "LULAC"]. The respondents then filed a Motion to Recall and Recast Findings of Fact and Conclusions of Law Liability Phase, Findings of Fact and Conclusions of Law – Remedy Phase and for the Rendition of a Rule 54(b) Judgment and for the Entry Thereof. The district court then issued an Order on October 19th, 1990:

> IT IS ORDERED that defendants Rule 54(b) Motion be and the same is hereby granted, and that the clerk of this Court enter a final Judgment upon the Order herein dismissing plaintiffs' claim that "the at-large election scheme of electing Appeal, Family, and District Court judges in the State of Louisiana unlawfully dilutes black voting strength and results in the denial of plaintiffs' opportunity to participate equally in the electoral process and to elect judges of their choice, in violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973," [Plaintiffs' *Fourth Supplemental and Amended Complaint*, prayer, paragraph (b)], pursuant to the *LULAC* decision, and the undersigned expressly determines that there is no just reason for delay in the entry of a final Judgment of this Order.

Petitioners appealed this Judgment to the United States Court of Appeals for the Fifth Circuit, where it was docketed under 90-3785. Thereafter, without further action in the Fifth Circuit, this petition was filed.[3]

ARGUMENT

I. THE FIFTH CIRCUIT CORRECTLY CONCLUDED IN *LULAC* THAT SECTION 2(b) OF THE VOTING RIGHTS ACT DOES NOT APPLY TO THE JUDICIARY.

A. The *LULAC* Decision.

As previously noted, the district court granted a 54(b) judgment based on the *en banc* decision of the United States Court of Appeals for the Fifth Circuit in *LULAC*.[4] The plaintiffs in *LULAC* challenged the county-wide, at-large

---

[3] On the 23rd day of July, 1990, petitioners filed a Motion to a three-judge court to enjoin at-large elections for certain unprecleared judgeships. The proceedings thereafter are, of course, on a separate track and a Jurisdictional Statement in connection therewith was filed with this Court on December 14th, 1990. *Clark v. Roemer*, No. 90-952, October Term, 1990.

[4] This Court has pending before it for consideration a Petition for a Writ of Certiorari as filed by the Houston Lawyers' Association and six individuals on November 21, 1990, *Houston Lawyers' Association v. Mattox*, 90-813, October Term, 1990, and a Petition for a Writ of Certiorari as filed by the League of United Latin American Citizens, Inc., on December 14, 1990, in the matter entitled *League of United Latin American Citizens, Inc. v. Mattox*, 90-974, October Term, 1990. Each of these cases seeks this Court's review of the decision as rendered by the United States Court of Appeal for the Fifth Circuit on September 28, 1990, in *Latin American Citizens Council #4434 v. Clements*, 914 F.2d 620 (5th Cir. 1990) (*en banc*). Pursuant to Supreme Court Rule 37, Louisiana may, without consent, file an amicus curiae brief in each of these cases. At the Clerk's suggestion, since what Louisiana would say is covered in this Response as well as its Response filed in the *Chisom* case, (90-757, October Term, 1990), Louisiana respectfully requests that, to the

(Continued on following page)

election of trial judges in Texas as violative of § 2(b) of the Voting Rights Act and of the United States Constitution. The trial court denied the constitutional claims, finding that the requisite discriminatory intent had not been proven. 914 F.2d at 623. The trial court, however, did find "that the Texas law produced an *unintended* dilution of minority voting strength" in violation of the "results" test of § 2(b) of the Voting Rights Act. 914 F.2d at 623 (emphasis in original). On appeal, a panel of the Fifth Circuit held that § 2(b) did not apply to trial judges because they are single-member officeholders who can be elected only at-large. 902 F.2d 293 (5th Cir. 1990).

The Fifth Circuit granted an *en banc* hearing *sua sponte*. A majority held that judges are not "representatives" within the meaning of § 2(b) of the Voting Rights Act and that the "results" test of § 2(b) does not apply to the judiciary. 914 F.2d 620 (5th Cir. 1990). Five judges concurred, agreeing with the view of the panel that trial judges are single-member officeholders. 914 F.2d at 634. Chief Judge Clark also concurred, limiting the case to its facts. 914 F.2d at 631. Only one Judge, Judge Sam Johnson, dissented. 914 F.2d at 651. After the *en banc* opinion was published, the panel in *Chisom* remanded this case to the district judge with orders to dismiss all Voting Rights Act claims. 917 F.2d 187 (5th Cir. 1990).

(Continued from previous page)

extent permissible, both this Response and the Response in *Chisom* be deemed an *amicus* brief in the *Houston* case as well as the *LULAC* case.

The *LULAC* panel decision and Judge Higginbotham's concurring opinion in the *LULAC en banc* opinion state that the "single-official doctrine" is applicable to judges who act alone such as Texas district judges. *LULAC*, 902 F.2d 293 (5th Cir. 1990); *LULAC*, 914 F.2d 620, 634 (5th Cir. 1990) (*en banc*) (Higginbotham, J., concurring). In the event that this Court holds that Section 2(b) of the Voting Rights Act does apply to the judiciary, Louisiana would argue that this "single-official doctrine" exception is applicable to Louisiana district judges and family court judges who also act alone in making their decisions.

B. The Genesis of § 2(b) of the Voting Rights Act.

Section 2 of the Voting Rights Act of 1965 forbade imposition or application of any "voting qualification or prerequisite to voting, or standard, practice, or procedure" to prevent any citizen from voting on account of race or color. 42 U.S.C. § 1973. This Court in *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), held that enforcement of § 2 required proof of racially-discriminatory intent.

Congress then passed the Voting Rights Act of 1982 amending § 2 to

> restore the "results test" – the legal standard that governed voting discrimination cases prior to [the Supreme Court's] decision in *Mobile v. Bolden* * * * * Under the "results test," plaintiffs are not required to demonstrate the challenged electoral law or structure was designed or maintained for a discriminatory purpose.

Thornburg v. Gingles, 478 U.S. 30, 43 n. 8, 106 S.Ct. 2752, 92 L.Ed.2d 25, 42 n. 8 (1986) (citations omitted). In writing § 2(b), Congress chose – with one significant exception – the words of Justice White in *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973). Justice White stated that plaintiffs' burden of proof was to show:

> that its members had less opportunity than did other residents in the district to participate in the political processes and to elect *legislators* of their choice.

412 U.S. at 766, 93 S.Ct. at 2339, 37 L.Ed.2d at 324 (emphasis supplied). Section 2(b) provides that a plaintiff class of citizens must show:

> that its members have less opportunity than other members of the electorate to participate in the political process and to elect *representatives* of their choice.

42 U.S.C. § 1973(b) (emphasis supplied). As the majority in *LULAC* recognized, the choice of the word "representatives" was a deliberate one: "the Congress was at some pains to adapt and broaden the Court's phrases so as to convey its precise meaning." 914 F.2d at 625.

C. This Court has always held that Judges are not "representatives."

As stated in the prior section, § 2(b) applies to "representatives." Members of the legislative and executive branches are certainly representatives, and the case law is replete with decisions holding that § 2(b) applies to such entities. *See, e.g., Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1534, 103 L.Ed.2d 839 (1989) (city council and mayor); *Edge v. Sumter County School District*, 775 F.2d 1509 (11th Cir. 1985) (school board); *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135, 105 S.Ct. 2673, 86 L.Ed.2d 692 (1985) (city aldermen); *United States v. Marengo County Commission*, 731 F.2d 1546 (11th Cir.), *appeal dismissed & cert. denied*, 469 U.S. 976, 105 S.Ct. 375, 83 L.Ed.2d 311 (1984) (county commission); *Velasquez v. City of Abilene*, 725 F.2d 1017 (5th Cir. 1984) (city council); *Brown v. Board of School Commissioners of Mobile County*, 706 F.2d 1103 (11th Cir.), *affirmed*, 464 U.S. 1005, 104 S.Ct. 520, 78 L.Ed.2d 705 (1983) (board of school commissioners); *Jordan v. Winter*, 604 F. Supp. 807 (N.D. Miss.), *affirmed*, 469 U.S. 1002, 105 S.Ct. 416, 83 L.Ed.2d 343 (1984) (congressmen).

Judges, however, traditionally have not been considered "representatives." This Court so held by affirming a three-judge court voting rights decision that the "one-man, one-vote" concept does not apply to the judiciary. *Wells v. Edwards*, 409 U.S. 1095, 93 S.Ct. 904, 34 L.Ed.2d 679 (1973). In refusing to apply "one-man, one vote" precepts, the three-judge court reasoned as follows:

> [A]s stated in Buchanan v. Rhodes [249 F. Supp. 860 (N.D. Ohio 1960), *appeal dismissed*, 385 U.S. 3, 87 S.Ct. 33, 17 L.Ed.2d 3 (1966)]:
>
> > "Judges do not represent people, they serve people." Thus, the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary.

> "The State judiciary, unlike the legislature, is not the organ responsible for achieving representative government." New York State Association of Trial Lawyers v. Rockefeller, 267 F.Supp. 148, 153.

Wells v. Edwards, 347 F. Supp. 453 (M.D. La. 1972) (three-judge court). The *LULAC* majority opinion reasons that "[i]t is impossible, given the single point at issue and the simple reasoning stated, to believe that the majority of the Supreme Court, in affirming *Wells*, did not concur in that reasoning." 914 F.2d at 627.

Similarly, Justice Frankfurter has stated: "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society." *Dennis v. United States*, 341 U.S. 494, 575, 71 S.Ct. 857, 95 L.Ed. 1137, 1160-61 (1951) (Frankfurter, J., concurring in the judgment). And Justice Stewart has contrasted the Court's duty with that of the people's representatives:

> It is the essence of judicial duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not. If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected *representatives* to repeal it.

Griswold v. Connecticut, 381 U.S. 479, 530-31, 85 S.Ct. 1678, 14 L.Ed.2d 510, 542 (1965) (Stewart, J., dissenting) (emphasis supplied).

D. Other Federal Courts have held that Judges are not "representatives."

The lower federal courts have also held that judges are not representatives. The plaintiffs in *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971) (three-judge court), attacked the North Carolina system of nominating judges by districts and electing them statewide, contending that it denied voters equal protection of the laws. They cited, *inter alia*, *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), and

Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). The court distinguished these and the other cases because they "dealt with the election of the representatives of the people – officials who make laws, levy and collect taxes, and generally manage and govern people." 335 F. Supp. at 930. After discussing two precedents involving reapportionment, the court stated:

> While *Buchanan [v. Rhodes*, 249 F. Supp. 860 (N.D. Ohio 1960), *appeal dismissed*, 385 U.S. 3, 87 S.Ct. 33, 17 L.Ed.2d 3 (1966)] and [*New York State Association of Trial Lawyers v.] Rockefeller* [267 F. Supp. 148 (S.D.N.Y. 1967], deal with the apportionment of judges rather than their election, they nevertheless point up the many pitfalls and briar patches which the courts will encounter if the one man, one vote principle is made applicable to the judiciary. The function of judges, contrary to some popular views of today, is not to make, but interpret the law. They do not govern nor represent people nor espouse the cause of a particular constituency. They must decide cases exclusively on the basis of law and justice and not upon the popular view prevailing at the time.

335 F. Supp. at 932. The *Holshouser* case was affirmed by the Supreme Court. 409 U.S. 807, 93 S.Ct. 43, 34 L.Ed.2d 68 (1972).

A similar system of electing judges in Georgia was upheld in *Stokes v. Fortson*, 234 F. Supp. 575 (N.D. Ga. 1964) (three-judge court). The court stated:

> [E]ven assuming some disparity in voting power, the one man-one vote doctrine, applicable as it now is to selection of legislative and executive officials, does not extend to the judiciary. Manifestly, judges and prosecutors are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency. Moreover there is no way to harmonize selection of these officials on a pure population standard with the diversity in type and number of cases which will arise in various localities, or with the

> varying abilities of judges and prosecutors to dispatch the business of the courts. An effort to apply a population standard to the judiciary would, in the end, fall of its own weight.

234 F. Supp. at 577.

In two New York cases the plaintiffs sought judicial reapportionment on the basis of population, again relying on legislative reapportionment cases such as *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). In *New York State Association of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148 (S.D.N.Y. 1967), the court rejected the comparison, stating that:

> The state judiciary, unlike the legislature, is not the organ responsible for achieving representative government. Nor can the direction that state legislative districts be substantially equal in population be converted into a requirement that a state distribute its judges on a per capita basis.
>
> * * * *
>
> In contrast to legislative apportionment, population is not necessarily the sole, or even the most relevant, criterion for determining the distribution of state judges. The volume and nature of litigation arising in various areas of the state bears no direct relationship to the population of those areas.

267 F. Supp. at 153-54. A three-judge court rejected a similar suit in the Eastern District of New York, quoting the *Rockefeller* opinion's statement that the state judiciary is not "responsible for achieving representative government." *Kail v. Rockefeller*, 275 F. Supp. 937, 941 (E.D.N.Y. 1967) (three-judge court).

The Ohio judicial structure guaranteeing each county at least one judge in the court of general jurisdiction came under attack in *Buchanan v. Rhodes*, 249 F. Supp. 860 (N.D. Ohio 1966), *appeal dismissed*, 385 U.S. 3, 87 S.Ct. 33, 17 L.Ed.2d 3 (1966), *vacated*, 400 F.2d 882 (6th Cir. 1968), *cert. denied*, 393 U.S. 839, 89 S.Ct. 118, 21 L.Ed.2d 110 (1968). Once again, the complaint was predicated upon the Supreme Court's reapportionment cases. The court noted that when representatives to a legislative body are malapportioned, the voting strength of individual citizens becomes

unequal, causing a dilution of power. 249 F. Supp. at 865. Judges, however, are not governed by such a rule:

> But in determining the reasonableness of a judicial system which permits at least one judge operating a court of general jurisdiction in each county, we must recognize one glaring distinction between the functions of legislators and the functions of jurists. Judges do not represent people, they serve people.

249 F. Supp. at 865.[5]

E. The Term "representatives" is not a Synonym for "elected officials".

Earlier sections of this Response demonstrate that this Court and the lower federal courts do not consider judges to be "representatives." This section argues that the word "representative" as used in § 2(b) is not synonymous with "elected official" and should instead be given its commonly understood meaning. This Court has laid down definitive

---

[5] Numerous other decisions make a similar distinction between judges and representative officials. *See Gilday v. Board of Elections of Hamilton County*, 472 F.2d 214, 217 (6th Cir. 1972) (rejecting application of one-man, one-vote to judicial selection in Ohio and holding "that equal protection does not require the allocation of state judges on this basis"); *Sagan v. Commonwealth of Pennsylvania*, 542 F. Supp. 880, 882 (W.D. Pa. 1982) (distinguishing judicial candidates from legislative and executive candidates because judges administer the law rather than espouse the cause of a particular constituency); *Fahey v. Darigan*, 405 F. Supp. 1386, 1391 n. 6 (D.R.I. 1975) (holding one-man, one-vote precepts inapplicable to "the selection of officials not intended to serve in a representative role, such as judges"); *Buchanan v. Gilligan*, 349 F. Supp. 569, 571 (N.D. Ohio 1972) (three judge court) (rejecting application of one-man, one-vote to Ohio judiciary because "[t]he state judiciary is not responsible for achieving representative government"); *Romiti v. Kerner*, 256 F. Supp. 35, 46 (N.D. Ill. 1966) (three judge court) (expressing "little doubt" that "there is a valid distinction between applying the 'one man, one vote' rule in a legislative apportionment case to the election of a state supreme court judiciary").

guidelines for construing language which appears in Congressional acts.

In *Consumer Products Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980), the Court stated:

> We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself.

447 U.S. at 108, 100 S.Ct. 2051, 64 L.Ed.2d at 773.

Four years later, in furtherance of this concept of construction, the Court held in *Escondido Mut. Water Co. v. La Jolla Indians*, 466 U.S. 765, 104 S.Ct. 2105, 80 L.Ed.2d 753 (1984):

> Since it should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses, we have often stated that " '[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive.' "

466 U.S. at 772, 104 S.Ct. 2105, 80 L.Ed.2d at 761 (citations omitted).

And in *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983), the Court said:

> [W]e state once again the obvious when we note that, in determining the scope of a statute, one is to look first at its language * * * * If the language is unambiguous, ordinarily it is to be regarded as conclusive unless there is " 'a clearly expressed legislative intent to the contrary.' "

460 U.S. at 110, 103 S.Ct. 986, 74 L.Ed.2d at 853 (citations omitted).

The term "representatives" refers to those who serve a specialized constituency and whose role is to represent the needs and interests of that constituency. The term "representatives" has never been commonly accepted as including the judicial branch; indeed, the reverse is true – namely, the judicial branch always has been treated as separate and distinct from the two representative arms of government.

A representative of a district, be it federal, state, or local, exists to serve and favor his or her constituency, while also

working for the good of the governmental jurisdiction as a whole. United States representatives are expected to help obtain government contracts for their districts; no one, however, would expect a federal judge to uphold such a contract citing as a reason the need of his area for governmental business. State legislators are expected to seek bridges and roads for their districts; no one, however, would expect a state judge to mandate that such bridges and roads be built merely because the people want them. City councilmen are expected to promote drainage projects for their council district; no one, however, would expect a city judge to require them to keep his voters happy.

Judges thus are not representatives; further, they should not be representatives. The larger the constituency, the less parochial pressures can be brought to bear. An advantage to at-large elections for judges is that judges can make the difficult decisions without undue fear of dissatisfaction in the electorate. A judge would be much less likely to vote against the residents of a neighborhood on a zoning issue if that judge was elected solely by that neighborhood. Justice ought to be identical throughout a judicial system; electing judges from neighborhoods, however, might make for a system of individualized justice currently foreign to the United States. Admittedly, many problems could be cured on appeal; however, it can be extremely difficult to reverse a detailed record of fact-finding even when the facts have been slanted. Further, the petitioners here seek to make appellate districts smaller also, again lessening the number and mix of a judge's electorate.

Congress, had it wanted specifically to include judges under Section 2(b) of the Voting Rights Act, could have done so by substituting the term "elected official" for the term "representative"; it did not do so. In a representative form of government, such as ours, it is always true that a "representative" is an "elected official"; however, the converse is *not* always true.

Representatives have a constituency which numbers in the hundreds to hundreds of thousands, to each of whom they owe fidelity and from many of whom they are likely, sooner or later, to receive correspondence or a telephone call or even

perhaps a personal visit. Judges have but one constituency, the blindfolded lady with the scales and sword.

F. The Fundamental Difference Between "representatives" and Members of the Judiciary is Deeply Rooted in this Country's History.

In holding that "the judiciary serves no representative function whatsoever," 914 F.2d at 625, the *LULAC* Court quoted Professor Eugene Hickok as stating that, "The judiciary occupies a unique position in our system of separation of powers, and that is why the job of a judge differs in a fundamental way from that of a legislator or executive." Hickok, "Judicial Selection: The Political Roots of Advice and Consent" in *Judicial Selection: Merit, Ideology and Politics* 5 (National Legal Center for the Public Interest 1990), *quoted at* 914 F.2d at 926.

Other scholars have also recognized this difference. Professor G. Edward White has written in *The American Judicial Tradition* that the American judicial tradition emerged with Chief Justice John Marshall.[6] A core element of that tradition has always included "a measure of true independence and autonomy for the appellate judiciary from the other two branches of government." *Judicial Tradition* 9. Professor White summarized Chief Justice Marshall's views concerning the judiciary as follows:

> An independent judiciary was logically the ultimate necessity in Marshall's jurisprudence, the culmination of his beliefs about law and government. He sought to show that judicial independence was not merely a side effect of federalism but a first principle of American civilization * * * * Against the potential chaos attendant on mass participatory democracy, republicanism erected the institutional buffers of legislative representatives and an independent judiciary. The excesses of the people were moderated by representation, a process by which

---

[6] Citations are hereinafter abbreviated as *Judicial Tradition*. Page references refer to the 1978 Oxford University Press paperback edition.

> their passionate demands were reformulated by an enlightened and reasonable class of public servants. The need of the populace for an articulation of their individual rights under law was met by the presence of a body of judges not beholden to the masses in any immediate, partisan sense.

Judicial Tradition 18, 20.

Chief Justice Marshall's vision of the American judicial tradition was not unique. Alexander Hamilton "envisaged judicial review as an exercise in politics through which an independent judicial elite could temper the democratic excesses of legislatures by affirming the republican political balances inherent in the Constitution." *Judicial Tradition* 24. Some of the Founding Fathers thought an independent judiciary necessary because "even a government made up of the people's representatives was not a sufficient buffer against the excesses of the mob." *Judicial Tradition* 320.

This American judicial tradition has also been applicable to the state judiciary. Professor White commented that the state constitutions "were patterned on the federal Constitution, with its tripartite division of powers." *Judicial Tradition* 109. James Kent, Chief Judge of the New York Supreme Court and later Chancellor of New York, "viewed the judiciary as a buffer between established wealth and the excessively democratic legislature." *Judicial Tradition* 112. Much more recently, Chief Justice Roger Traynor of the California Supreme Court wrote that judges "enjoyed a 'freedom from political and personal pressures and from adversary bias' [and that] [t]heir 'environment for work' was 'independent and analytically objective.' " *Judicial Tradition* 296, quoting Traynor, "Badlands in an Appellate Judge's Realm of Reasons," 7 Utah L.Rev. 157, 167, 168 (1960).

Professor White traced "modern liberalism" trends throughout the Twentieth Century. According to this political theory, judges "were not, by and large, representatives of the people, and their nonpartisan status insulated them from the waves of current opinion." *Judicial Tradition* 320. Legislatures, on the other hand, "were 'representative of popular opinion' and could 'canvass a wide spectrum of views.' "

Judicial Tradition 322. One Twentieth Century Justice, Felix Frankfurter, has called the judiciary the "antidemocratic, unrepresentative" branch of government." *Judicial Tradition* 367.[7]

Various legal theorists have also stated that judges are not "representatives." Perhaps the most provocative book to appear on judicial review during the last few years is *Democracy and Distrust* by Professor John Hart Ely.[8] Professor Ely contrasts the role of the courts with the role of the representative branch of government, the legislative branch. He sought an approach to judicial review "not hopelessly inconsistent with our nation's commitment to representative democracy." *Democracy and Distrust* 41. In his book, Professor Ely developed a representation-reinforcing theory of judicial review in which the non-representative branch (the judiciary) would review legislation to determine the motivation of the representative branch (the legislature) to make sure that the views of all groups were represented in lawmaking. He concluded by stating that "constitutional law appropriately exists for those situations where representative government cannot be trusted." *Democracy and Distrust* 183.

Professor Alexander Bickel spoke of the importance of judicial independence in *The Supreme Court and the Idea of Progress*.[9]

> The restraints of reason tend to ensure also the independence of the judge, to liberate him from the demands and fears – dogmatic, arbitrary, irrational, self-or group-centered, – that so often enchain other public officials. They make it possible for the judge, on some occasions, at any rate, to oppose

---

[7] Professor Lawrence Friedman also has written about the history of a strong, independent judiciary in both federal and state governmental systems. L. Friedman, *A History of American Law* 116, 118 (Simon & Schuster 1973 paperback edition).

[8] Page references are to the 1980 Harvard University Press hardbound edition.

[9] Citations are hereinafter abbreviated as *Supreme Court and Progress*. Page references refer to the 1978 Yale University Press paperback edition.

> against the will and faith of others, not merely his own will or deeply-felt faith, but a method of reaching judgments that may command the allegiance, on a second thought, even of those who find a result disagreeable. The judge is thus buttressed against the world, but what is perhaps more significant and certain, against himself, against his own natural tendency to give way before waves of feeling and opinion that may be as momentary as they are momentarily overwhelming.
>
> * * * *
>
> The independence of the judges is an absolute requirement if individual justice is to be done, if a society is to ensure that individuals will be dealt with in accordance with duly enacted policies of the society, not by the whim of officials or of mobs, and dealt with evenhandedly, under rules that would apply also to others similarly situated, no matter who they might be.

Supreme Court and Progress 82, 84.

Professor Bickel contrasted the Court with the people and its representatives, stating, "Virtually all important decisions of the Supreme Court are the beginnings of conversations between the Court and the people and their representatives." *Supreme Court and Progress* 91.[10]

G. The "dichotomy" between Sections 2 and 5 of the Voting Rights Act.

The petitioners argue on pages 12-13 of the Petition that there is a dichotomy between Section 2 and Section 5 of the Voting Rights Act because the Attorney General is barring creation of new at-large judgeships in Louisiana based on Section 5 objections. Of course, the Section 5 question is the

---

[10] *Supreme Court and Progress* also contains much material on reapportionment. *Supreme Court and Progress* 35, 158-59, 168-73. Never in that discussion is there any intimation that reapportionment requires judicial redistricting. Indeed, such a notion would run counter to Professor Bickel for his strong arguments for judicial independence.

subject of another case before this Court.[11] At any rate, the Justice Department's position apparently is not that the addition of a new judge in a judicial district was a change made because of racial animus, but instead that the Justice Department is opposed to the at-large system of electing judges, a system in effect in Louisiana since 1946, *see* LA. R.S. 13:582-585, predating by decades the Voting Rights Act of 1965. *See Beer v. United States*, 425 U.S. 130, 139, 96 S.Ct. 1357, 47 L.Ed.2d 629, 638 (1976).

At the hearing before the three judge court in *Clark* on October 18, 1990, the Justice Department steadfastly refused to explain why it was not preclearing the additional seats even though the Department stated in writing that its objection was "not to the number of judges *per se*", Appendix 2, and that it did not question the State of Louisiana's "need for or purpose in creating new judgeship positions." Appendix 12. Instead, as is clear by the September 17, 1990, letter, Appendix 11, the Justice Department objects to Louisiana's long-standing system of electing judges, and instead prefers other "systems" such as limited voting.[12]

---

[11] On December 14, 1990, these same petitioners filed a Jurisdictional Statement to review a three-judge court opinion in this case. *Clark v. Roemer*, No. 90-952. That matter is pending.

[12] Limited voting is a system under which each voter cannot vote for every position on the ballot. For example, if there were ten positions to be elected in an area with a 40% minority population, limited voting would give each voter only four votes. Therefore, imposition of a limited voting system would itself appear to violate the provisions of the Voting Rights Act, which provides that nothing in the Act "shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person registered to vote under the law of any State or political subdivision." 42 U.S.C. § 1973n. Further, limited voting has been uniformly rejected as a judicial remedy in Voting Rights Act cases. In *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988), a Voting Rights Act case involving the judiciary, the district court called it "experimental," "contrary to most election laws of Mississippi and the policy contained therein," and

(Continued on following page)

While the Justice Department cannot "unpreclear" the seats it has previously approved, a total of 222 judgeships out of a judiciary consisting of 240 judges, and while its current objections affect only 18 seats in 11 judicial districts, the Justice Department candidly concedes that it seeks to uproot and destroy the entire Louisiana judicial election system.[13] By ignoring the decision in this case that the Louisiana "system" of electing judges cannot violate Section 2 of the Voting Rights Act, by ignoring the precepts in *Thornburg v. Gingles*, 478 U.S. 30, 56, 106 S.Ct. 2752, 92 L.Ed. 25, 50 (1986), which holds that any remedy under Section 2 must be district-specific and not systemic, and by ignoring the *LULAC* decision, the Justice Department's position flies in the face of judicial authority and violates its own internal rule requiring that preclearance determinations be guided by relevant federal judicial decisions. *See* 28 C.F.R. Ch. 1 (7-1-89 Edition) § 5.56.

If there is a "dichotomy" between Sections 2 and 5,[14] it is caused not by the eminently correct decision in this case and *LULAC*, but rather by the attempt of the Justice Department to rewrite Section 5 while depriving Louisiana of desperately needed judges in areas of the State concerning which the lower court held there is no Section 2 violation, and through

---

(Continued from previous page)

"contrary to most general concepts of a democratic two-party system." *Id.* at 337. Limited voting for judges was held violative of the Pennsylvania Constitution in *Mezvinsky v. Davis*, 459 A.2d 307 (Pa. 1983). Uncontested evidence during the remedy phase of this case showed that limited voting has been adopted as a "system" in only approximately 200 of the more than 86,000 local governmental units in this country. Cumulative voting means one can cast votes numerically dependent upon the total number of elective positions. For instance, if a Parish has 14 district judges then a voter can cast all 14 votes for one of these district judges.

[13] *See* Appendix 4-16.

[14] That there are differences between Sections 2 and 5 of the Voting Rights Act is no surprise. For example, a Section 2 violation can exist even when the affected jurisdiction has received Section 5 preclearance, and the "results test" was added in 1982 to Section 2, although that same change was not made in Section 5.

an election process which *LULAC* holds cannot violate Section 2.[15]

It is not Louisiana's position that Section 5 is completely inapplicable to the judiciary any more than it is Louisiana's position that Section 2 is completely inapplicable to the judiciary. If a state passed a statute imposing a poll tax for judicial elections, or allowing only voters of one race to vote for judicial officials, such laws would violate both Section 2 and Section 5, as well as the Fourteenth and Fifteenth Amendments. No such intentional discrimination is claimed in this case by the Justice Department. When, as here, however, a law simply adds a much-needed judicial seat to a multi-member district, in the absence of discriminatory intent such a statute is not covered by either Section 2 (because the "results test" is inapplicable to the judiciary) or by Section 5 (because Section 5 cannot be used as a guise to preclude a state from adding a judicial seat when such a seat cannot be enjoined under Section 2).

II. IF THE ONE-MAN, ONE-VOTE REQUIREMENT DOES NOT APPLY TO THE JUDICIARY, THE CONCEPT OF MINORITY VOTE DILUTION SET FORTH IN § 2(B) DOES NOT APPLY TO THE JUDICIARY.

This Court has held that the one-man, one-vote requirement does not apply to the judiciary. *Wells v. Edwards*, 409 U.S. 1095, 93 S.Ct. 904, 34 L.E.2d 679 (1973). If this requirement is inapplicable, the concept of minority vote dilution in at-large districts is similarly inapplicable to the judiciary. As the Fifth Circuit held in *LULAC*:

---

[15] Indeed, if there is a "dichotomy" in the applicability of the Voting Rights Act to Louisiana's judiciary, it is in the Justice Department's inconsistent treatment of additional judgeships. In two letters dated September 17, 1990, the Justice Department stated that portions of Act 8 of 1990 adding judgeships would not be precleared, but other portions of the same statute adding judgeships were precleared. *Compare* Appendix 4, 12 and 16 *with* Appendix 19.

> Absent the one-person, one-vote rule – that the vote of each individual voter must be roughly equal in weight to the vote of every other individual voter, regardless of race, religion, age, sex, or even the truly subjective and uniquely individual choice of where to reside – there is no requirement that any individual's vote weigh equally with that of anyone else. This being so, and no such right existing, we can fashion no remedy to redress the non-existent wrong complained of here.
>
> The notion of *individual* vote dilution, first developed by the Supreme Court in Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), was the foundation for the concept of *minority* vote dilution to be later elaborated in Whitcomb v. Chavis, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), White v. Regester, [412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973)], and Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973). Individual vote dilution was remedied by the Court through the concept of one-person, one-vote – the guarantee of substantial equality among individual voters. With that guarantee in mind, remedial schemes to combat minority vote dilution were devised on a case by case basis.

914 F.2d at 627 (emphasis in original). The Senate Report concerning the 1982 amendment to the Voting Rights Act states "[t]he principle that the right to vote is denied or abridged by dilution of voting strength derives from the one-person, one-vote reapportionment case of *Reynolds v. Sims*." S.Rep.No. 417, 97th Cong. 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Admin. News at 177, 196.

The key issue, therefore, is whether Section 2(b) of the Voting Rights Act enshrines the "one-man, one-vote" principle as the touchstone test. If it does, then it cannot be used to analyze judicial elections, because the "one-man, one-vote" test was expressly rejected as applying to the judiciary in *Wells v. Edwards*, 347 F.Supp. 453 (M.D. La. 1972), *affirmed* 409 U.S. 1095, 93 S.Ct. 904, 34 L.Ed.2d 679 (1973).

The express language of the plurality opinion in *Gingles*, bolstered by the language of the concurring opinions, shows

that Section 2(b) is solely a "one-man, one-vote" litmus test. Justice Brennan, in speaking for the plurality, began by noting that when Section 2 of the Voting Rights Act was amended in 1982 to add Section 2(b), the Congressional revision was a response to the plurality opinion in *Mobile v. Bolden*, 478 U.S. at 35, 106 S.Ct. at 2759, 92 L.Ed.2d at 37. The plurality in *Gingles*, in interpreting what evidence it takes under Section 2(b) to prove a Section 2(a) violation, established a three-fold test:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. * * * Second, the minority group must be able to show that it is politically cohesive. * * * Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it, – in the absence of special circumstances, such as a minority candidate running unopposed * * * usually to defeat the minority's preferred candidate * * * * In establishing this last circumstance, the minority group demonstrates that the submergence in a white multimember district impedes its ability to elect its chosen representatives.

478 U.S. at 50-51, 106 S.Ct. at 2766-67, 92 L.Ed.2d 46-47.

As Justices O'Connor, Powell, Rehnquist, and Chief Justice Burger recognized in their concurring opinion in *Gingles*, this three-fold test equates to a requirement of proportional representation; i.e., one-man, one-vote. Justice O'Connor, speaking for these Justices, stated:

> Third, although the Court does not acknowledge it expressly, the combination of the Court's definition of minority voting strength and its test for vote dilution results in the creation of a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups that are large enough to constitute majorities if concentrated within one or more single-member districts.

478 U.S. at 85, 106 S.Ct. at 2784-2785, 92 L.Ed.2d at 69.

> In my view, the Court's test for measuring minority voting strength and its test for vote dilution, operating in

> tandem, come closer to an absolute requirement of proportional representation than Congress intended when it codified the results test in § 2.

478 U.S. at 94, 106 S.Ct. at 2789, 92 L.Ed.2d at 74.

> The Court's standard for vote dilution, when combined with its test for undiluted minority voting strength, makes actionable every deviation from usual, rough, proportionality in representation for any cohesive minority group as to which this degree of proportionality is feasible within the framework of single-member districts. Requiring that every minority group that could possibly constitute a majority in a single-member district be assigned to such a district would approach a requirement of proportional representation as nearly as is possible within the framework of the single-member districts. Since the Court's analysis entitles every such minority group usually to elect as many representatives under a multi-member district school, *it follows that the Court is requiring a form of proportional representation.*

478 U.S. at 97, 106 S.Ct. at 279, 92 L.Ed.2d at 76-77 (emphasis supplied).

Justice O'Connor, and the other Justices who joined in her concurring opinion, recognized that proportional representation (one-man, one-vote) is the result of the plurality's opinion. It was exactly this type of proportional representation that the plurality in *Mobile v. Bolden* had *rejected* in its analysis of both Section 2 (pre-1982 amendments) and the Fourteenth and Fifteenth Amendments:

> The theory of [Justice Marshall's] dissenting opinion – a theory much more extreme than that espoused by the District Court or the Court of Appeals – appears to be that every "political group," or at least every such group that is a minority, has a federal constitutional right to elect candidates in proportion to its numbers. * * *
>
> Whatever appeal the dissenting opinion's view may have as a matter of political theory, it is not the law.

446 U.S. at 75, 100 S.Ct. at 1504, 64 L.Ed.2d at 63-64.

The plurality in *Mobile* recognized that what is now Section 2(a) does not require a "proportionality" test. Section 2(a) was not substantially changed in the 1982 amendments. Thus, if Section 2(b) establishes a "one-man, one-vote" test, then under *Wells* it cannot be used against the judiciary.

The petitioners may take the position that there is a distinction between a "proportionality" test and a "one-man, one-vote" test. Such an argument would be unavailing, as the plurality opinion in *Mobile v. Bolden* expressly recognized.

After discussing (and rejecting) the dissent's argument concerning proportionality, the plurality in *Mobile* went further and determined that the "proportionality" argument equated to a "one-man, one-vote" test.

> The dissenting opinion erroneously discovers the asserted entitlement to group representation within the "one person, one vote" principle of *Reynolds v. Sims, supra*, [377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964)] and its progeny.

446 U.S. at 77, 100 S.Ct. at 1505, 64 L.Ed.2d at 65. As *Mobile v. Bolden* recognized, the term "vote dilution" is equivalent to holding that there is a "one-man, one-vote" test. 446 U.S. at 78, 100 S.Ct. at 1505, 64 L.Ed.2d at 65-66. As the plurality in *Mobile v. Bolden* stated:

> There can be, of course, no claim that the "one-person, one-vote" principle has been violated in this case * * * it is therefore obvious that nobody's vote has been "diluted" in the sense in which that word was used in the *Reynolds* case.
>
> * * *
>
> It is, of course, true that the right of a person to vote on an equal basis with other voters draws much of a significance from the political associations that its exercise reflects, but it is an altogether different matter to conclude that political groups themselves have an independent constitutional claim to representation.

446 U.S. at 78, 100 S.Ct. 1505, 1507, 64 L.Ed.2d at 65, 66.

Because *Gingles* involves only the interpretation of Section 2(b), and because *Wells* prohibits the use of a "one-man, one-vote" test involving judicial elections, it is clear that the

Section 2(b) results test cannot be used to prove a violation of Section 2(a) in judicial elections.

The concept of dilution of group voting strength [which is embodied in subsection (b) of amended Section 2] rests on two assumptions: (1) that each person's vote should have the same weight as another person's vote, and (2) that a given (protected) group should wield roughly the aggregate voting strength of its members. *See Zimmer v. McKeithen*, 485 F.2d 1297, 1303 (5th Cir. 1973). If the first assumption is not true, the second cannot be made. For *without* the assumption of substantial equality among voting shares made possible by the one-man, one-vote principle, no aggregate measure of minority voting strength – and therefore no measure of dilution of that strength – is conceivable. Because the one-man, one-vote rule does *not* apply to the judiciary, the conceptually dependent notion of minority group vote dilution, embodied in subsection (b), has no field of operation in judicial elections.

This argument has nothing to do with statutory interpretation, does not depend on a particular construction of the word "representative" as used in subsection (b), and is not based on whether Congress intended that amended Section 2 have some field of operation with respect to judicial elections. It is, instead, based on an explanation of why, regardless of what breadth Congress intended for amended Section 2, minority group vote dilution – as that concept has developed in the voting rights jurisprudence – simply cannot exist unless the one-man, one-vote rule applies.

Thornburg v. Gingles, the Court's definitive exegesis of Section 2 vote dilution, sharpens this point. In her concurring opinion, Justice O'Connor, joined by Powell, Rehnquist, and Chief Justice Burger, notes that "[i]n order to evaluate a claim that a particular multimember district or single-member district has diluted the minority group's voting strength to a degree that violates § 2 . . . it is . . . necessary to construct a measure of 'undiluted' minority voting strength." *Gingles*, 478 U.S. at 88, 106 S.Ct. 2786, 92 L.Ed.2d at 71. There is no doubt that the yardstick adopted by the *Gingles* Court – a calculation of the minority's potential voting strength in a single-member district system – rests on the assumption that

the one-man, one-vote rule applies and that each district has roughly the same population. *See* 478 U.S. at 50-51 n. 17, 89-90, 106 S.Ct. 2766-67 n. 17, 2787, 92 L.Ed.2d at 46-47 n.17, 72. Otherwise, to paraphrase Justice Harlan, the Court would be unable even to measure what it purports to equalize. *Whitcomb v. Chavis*, 403 U.S. at 169, 91 S.Ct. 1883, 29 L.Ed.2d at 391 (Harlan J., separate opinion).

Without the measure of individual voting strength provided in legislative cases by the one-man, one-vote rule, *Gingles'* first prong is meaningless in the judicial context. It is always possible to construct a geographically compact black voting majority district by continuing to reduce the total population in that district down to, if necessary, a minimum of one. There are no "judicially discernable and manageable standards" by which a court could find that a given judicial election system does *not* dilute minority voting strength if the population size of the hypothetical single-member subdistrict can be contracted or expanded at will. *See Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663, 686 (1962). As one lower court has held, "An effort to apply a population standard to the judiciary would, in the end, fall of its own weight." *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964).

CONCLUSION

This Court has always recognized the importance of an independent judiciary, holding in *Chandler v. Judicial Council*, 398 U.S. 74, 90 S.Ct. 1648, 26 L.Ed.2d 100 (1970): "There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function." 398 U.S. at 84, 90 S.Ct. 1648, 26 L.Ed.2d at 108. In a dissent in the same case, Justice Douglas stated, "An independent judiciary is one of this Nation's outstanding characteristics." 398 U.S. at 136, 90 S.Ct. 1648, 26 L.Ed.2d at 137 (Douglas, J., dissenting).

A quarter of a century ago this Court declared, "Legislators represent people, not trees or acres." *Reynolds v. Sims*, 377 U.S. 533, 562, 84 S.Ct. 1362, 12 L.Ed.2d 506, 527 (1964). Unlike legislators, judges are not "instruments of government elected directly by and directly representative of the people." 377 U.S. at

562, 84 S.Ct. 1362, 12 L.Ed.2d at 527. Making judges representatives would do violence to (and perhaps destroy) the American concept of an independent judiciary.

For the reasons set forth herein, this Court should deny the Petition for Certiorari.

All of the above and foregoing is thus respectfully submitted.

ROBERT G. PUGH
Counsel of Record
ROBERT G. PUGH, JR.
Of the Law Firm of
PUGH, PUGH & PUGH
Commercial National Tower, Suite 2100
333 Texas Street
Shreveport, LA 71101-5302
(318) 227-2270

JOHN N. KENNEDY
Special Counsel to the Governor
THOMAS A. CASEY
Executive Counsel to the Governor
Office of the Governor
Fourth Floor
State Capitol Building
Baton Rouge, Louisiana 70804
(504) 342-7015

Attorneys for and on behalf of Charles "Buddy" Roemer Governor of Louisiana

MICHAEL H. RUBIN
CHRISTINA B. PECK
RUBIN, CURRY, COLVIN & JOSEPH
Ninth Floor
One American Place
Baton Rouge, Louisiana 70825
(504) 383-9000

Attorneys for the Louisiana District Judges Association

KENNETH C. DEJEAN
First Assistant Attorney General
Louisiana Department of Justice
Office of the Attorney General
Second Floor
State Capitol
Baton Rouge, Louisiana 70804
(504) 342-7014

Attorney for and on behalf of William J. Guste, Jr. Attorney General of Louisiana

CYNTHIA YOUNG ROUGEOU
Special Counsel to the Secretary of State
State of Louisiana
Post Office Box 94125
Baton Rouge, Louisiana 70804
(504) 342-2065

Attorney for and on behalf of Fox McKeithen Secretary of State of Louisiana

[SEAL]

U.S. Department of Justice
Civil Rights Di· ·ion

Office of the
Assistant Attorney General *Washington, D.C. 20530*

OCT 9 1990

Cynthia Y. Rougeou, Esq.
Assistant Attorney General
P.O. Box 94125
Baton Rouge, Louisiana 70804-9125

Dear Ms. Rougeou:

This refers to your request that the Attorney General reconsider the September 23, 1988, objection under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, to the voting changes identified in Attachment A for the State of Louisiana. We received your request on August 10, 1990.

Under the Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, an objection shall be withdrawn "if the Attorney General is satisfied that the change does not have the purpose and will not have the effect of discriminating on account of race, color, or membership in a language minority group." 28 C.F.R. § 51.48(b). In its request for reconsideration the State of Louisiana has offered no new information or arguments to show that the electoral method by which its additional judges will be elected is not racially discriminatory. Rather, it appears that the State seeks a clarification of the reach of the Attorney General's objection.

In that regard, we iterate here what we sought to make clear in our September 23, 1988, objection letter, that our concerns under Section 5 went to the proposed method of electing judges and not to the number of judges *per se*. As we have suggested previously on a number of occasions, adoption by the State of a racially fair election scheme would provide an appropriate basis for withdrawing the objection. Until such time as the objection is withdrawn, however, the State may not lawfully implement any part of the process for electing those judicial positions which are the subject of outstanding Section 5 objections. See *NAACP v. Hampton County Election Commission*, 460 U.S. 166 (1985).

Under these circumstances, then, we see no basis for altering our earlier conclusions in this matter. Accordingly, on behalf of the Attorney General, I must decline to withdraw the September 23, 1988, objection.

Of course, in making this determination, we are cognizant of the recent decision of the Fifth Circuit Court of Appeals in *LULAC v. Mattox*, No. 90-8014 (5th Cir. September 28, 1990) (*en banc*) and we are studying the court's decision in that case to determine how, if at all, it may impact upon our enforcement responsibilities under the Voting Rights Act. However, we feel a responsibility to point out that we do not presently see that decision as immediately affecting the previously interposed objections to judicial elections in Louisiana.

Sincerely,

/s/ John R. Dunne
John R. Dunne
Assistant Attorney General
Civil Rights Division

ATTACHMENT A

Judicial District Court Districts	Voting Changes
1st	Act 117 (1973), which creates an additional judgeship and a special election therefor
4th	Act 480 (1970), which creates an additional judgeship position
9th	Act 19 (1974), which creates an additional judgeship and a special election therefor
14th	Act 40 (1967), which creates an additional judgeship and a special election therefor
	Act 332 (1975), which creates an additional judgeship and a special election therefor
	Act 322 (1980), which creates an additional judgeship
15th	Act 360 (1970), which creates an additional judgeship and a special election therefor
	Act 43 (1976), which creates an additional judgeship
	Act 322 (1980), which creates an additional judgeship
18th	Act 86 (1968), which creates an additional judgeship and a special election therefor

[SEAL]

U.S. Department of Justice
Civil Rights Division

Office of the
Assistant Attorney General *Washington, D.C. 20530*

SEP 17 1990

Cynthia Y. Rougeou, Esq.
Assistant Attorney General
State of Louisiana
P.O. Box 94125
Baton Rouge, Louisiana 70804-9125

Dear Ms. Rougeou:

This refers to your request that the Attorney General reconsider and withdraw the September 23, 1988, and May 12, 1989, objections under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, to the voting changes identified in Attachment A for the State of Louisiana. We received your requests on June 19 and 26 and August 10, 1990; supplemental information was received July 12 and 17, 1990.

This also refers to the voting changes identified in Attachment B for the State of Louisiana, submitted to the Attorney General pursuant to Section 5. We received your submission of Act 8 (1990) on June 19, 1990; supplemental information concerning those changes was received June 26 and July 12 and 17, 1990. We received the information to complete your submission of the remaining changes identified in Attachment B on July 17, 1990.

At the outset we begin with a recitation of some of the events which have preceded our review of all the voting changes which are before us today because those events play an important part in our consideration of these matters. You may recall that in 1987, we sent the State a number of letters requesting information concerning numerous voting changes within judicial election circuits and districts in Louisiana, including a request that the State respond to allegations that the method of electing trial and appellate court judges discriminated against minority voters. The State, however, failed to respond to our requests.

Meanwhile, in 1988, the court in *Clark v. Edwards* – a suit brought in 1986 by private plaintiffs challenging the method of electing judges in Louisiana – found that the method of electing trial and appellate court judges produced a "systemic" violation of Section 2 of the Voting Rights Act. By the time of the court's 1988 decision, the State still had not supplied us with the additional information we needed to analyze the voting changes in judicial circuits and districts then pending before us. Consequently, we used the record and findings from the *Clark* lawsuit to analyze the voting changes that were then pending before us for Section 5 review. On September 23, 1988, an objection was interposed under Section 5 of the Voting Rights Act.

In 1989, the State again submitted voting changes to us for Section 5 review and, there again, sought Section 5 preclearance of voting changes in judicial circuits and districts that had been found by the court in *Clark* to be racially discriminatory or had otherwise been the subject of the Section 5 objection interposed in 1988. Thus, on

May 12, 1989, a Section 5 objection was interposed to the implementation of those changes.

Later that year, in the summer of 1989, the State adopted a new election scheme, intended to remedy both the Section 2 violations found by the *Clark* court and the Section 5 objections interposed by the Attorney General in 1988 and 1989. However, because the proposed system created new senior judgeship positions in an apparent effort to accommodate and protect incumbent judges who might otherwise lose their seats if a racially fair election scheme were put in place, it required the approval of the voters in a state-wide referendum. As you know, that proposed scheme was disapproved by the voters in a November 1989 referendum.

Remedial proceedings in the *Clark* lawsuit were held earlier this year and those proceedings culminated in additional findings from the court. *Clark v. Roemer*, No. 86-435 (M.D. La., Orders of June 12 and July 6, 1990). On the basis of those findings alone, the State now seeks reconsideration of the previously interposed objections, as well as Section 5 preclearance of other voting changes which were either never before the court in the *Clark* litigation or were otherwise not before that court in the same circumstances as they are before us under Section 5. These include the 10th, 24th, 26th and 40th Judicial Districts, and the 2nd and 3rd Circuit Courts of Appeal. With regard to these judgeship positions and the proposed method of election therefor, we find the *Clark* decision to be inapposite because it pertains to factual circumstances in a judicial district different from the judicial district now before us for Section 5 review.

In that regard, we note that the differing factual circumstances are not insignificant. For example, one aspect of the *Clark* litigation involved a challenge to the method of electing judges in the 26th District. Because the State had not obtained Section 5 preclearance of the creation of a fifth judgeship in that District, the court in *Clark* examined the evidence in the context of four existing judgeships. Because the State has submitted to us a proposal to add a fifth judgeship to the 26th District, however, we are reviewing the method of electing judges in that district as it would exist if *five* judges were being elected. This distinction is critical because the *Clark* court found that a sample single-member district drawn in that District by private plaintiffs did not satisfy the requirement under *Thornburg v. Gingles*, 478 U.S. 30 (1986), that the minority group be shown to be sufficiently large and geographically compact to constitute a majority in a single-member district. As a result, though the at-large multimember structure in the 26th District now has been found by the court in *Clark* not to violate Section 2 because of that finding, the court properly made no determination with regard to the method of election if five judges were to be elected from that district.

Another example of how the facts and circumstances before us differ from those which were before the court in *Clark* is in the 2nd Circuit Court of Appeal. In the 2nd Circuit, the claims before the *Clark* court involved a challenge to a mixed election system for seven judges, in which one judge was elected at large circuitwide and six judges were elected from three double-member districts. We, however, are reviewing the creation of additional judgeship positions for the 2nd Circuit in the context of

proposed changes to the electoral structure: first, to an interim scheme of one circuitwide position, one double-member district and two triple-member districts; and, second, to an election scheme that subsequently will be comprised of three triple-member districts with at-large elections by designated posts, staggered terms, and majority vote. Similarly, as to the 3rd Circuit, the *Clark* Litigation involved a challenge to a scheme of three at-large circuitwide positions and three double-member districts, while we have been asked to assess the creation of additional judgeship positions in the context of an electoral structure that provides for three at-large circuitwide positions and three triple-member districts.

The fact, then, that the *Clark* court has vacated some of its findings as to a violation under Section 2 does not in and of itself afford a basis for withdrawing the objection under Section 5 to the voting changes involved. Indeed, during our reconsideration of the objected-to voting changes and our review of the additional voting changes that you have submitted, you have provided us with additional information concerning the voting changes and judicial districts at issue by incorporating information contained in certain Section 5 submissions that you made in 1989 and in response to our requests during the current review period. Much of the information does not appear to have been before the court in the *Clark* case. For example, in analyzing voting patterns to determine whether black voters are politically cohesive and whether whites vote sufficiently as a bloc usually to defeat the choice of black voters, the court in several instances did not have the benefit of any data concerning

parishwide election contests or data by parish for contests involving a number of parishes. We have analyzed such data, and our analysis indicates a significant degree of racially polarized voting in the districts at issue. Also, we have been able to analyze information that was not before the court concerning the racial identity of federally-registered voters, as well as demographic and voting information concerning modifications to alternative election schemes that demonstrate the geographical concentration of black persons in certain judicial districts.

Nor can we overlook the fact that in the face of findings of a systemic Section 2 violation by the *Clark* court in 1988, and notwithstanding the interposition of far-reaching Section 5 objections in 1988 and 1989, the State has failed to adopt a racially fair election system for its trial and appellate court judges even though the *Clark* court has given the State ample opportunity to do so. While, as noted above, the State did propose a new election scheme in 1989, it did so in a way which was intended also to protect incumbent judges. It is also particularly telling that there is nothing in Louisiana law we are aware of which would prevent the State from simply adopting a racially fair election scheme without incorporating referendum requiring provisions such as that connected with the earlier proposal aimed at current officeholders. Thus, the State's failure and refusal to adopt any remedial measures without also seeking to protect incumbents, the vast majority of whom are white, would appear to be elevating the State's concern for protecting white incumbents over the vindication of minority voting rights.

It is also significant that in several judicial districts, the State has available to it any number of alternative election schemes in which black voters clearly would have the opportunity to elect candidates of their choice. Yet, the State has not adopted any of these alternatives. For example, with regard to the proposed redistricting of the 10th District, we note that the State proposes to carve out one parish in order to create a new single-member judicial district, the 39th District, which has a 36.4 percent black population. The State thus chose to divide the 10th District in a manner that created one majority-white, single-member district, even though a single-member judicial district could be created which would have a substantial black-majority population. While we are cognizant that the proposed boundary lines apparently are based on parishes as the basic building blocks, these lines are not jurisdictional in nature but serve merely to outline the boundaries of the districts for election purposes. Accordingly, strict adherence to this criterion results in the dilution of a cohesive black population within the proposed new districts. Moreover, the State has deviated from this criterion in devising the districts of the 5th Circuit Court of Appeal which, inexplicably, the state has chosen not to do with regard to the proposed 10th and 39th Districts.

Similarly, with regard to the 2nd Circuit Court of Appeal, which has a 34.2 percent black population, there are alternatives for electing the proposed nine judges in which black voters would have a realistic opportunity to elect candidates of their choice. Also, with regard to the 3rd Circuit Court of Appeal, which has a 23.7 percent black population, available alternatives for the proposed

twelve judges would afford black voters the opportunity to elect candidates of their choice. As noted in our 1988 objection letter, such remedial alternatives would not necessarily require the State to draw single-member districts in every instance since, in a number of areas, the State could retain the multimember system utilizing limited or cumulative voting and abandoning the use of the racially discriminatory features such as numbered posts and majority vote which enhance dilution is those circuits.

In 1988, the *Clark* court admonished the State to "revise the [judicial election] system – to cast about for alternative procedures under which black voters would have a better chance to elect judicial candidates of their choice." *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988). So too, in 1988, we informed the State that it had a responsibility to consider appropriate remedial adjustments to afford black voters an opportunity to participate on an equal basis with white voters and to elect candidates of their choice. Notwithstanding these suggestions, the State has steadfastly adhered to the racially discriminatory multimember scheme and has resisted efforts in the *Clark* case to create single-member districts. Yet, as noted earlier, single-member districts are not the only available remedy. Indeed, our September 23, 1988 letter expressly observed that other corrective measure [sic] were available to the State, such "as the use of limited or cumulative voting schemes and the elimination of restrictive election features, such as anti-single shot voting devices and the majority vote requirement, that impede minority participation." The State has chosen not to avail itself of such remedial options.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has no discriminatory purpose or effect. See *Georgia v. United States*, 411 U.S. 526 (1973); see also 28 C.F.R. 51.52. In satisfying its burden, the submitting authority must demonstrate that the choices underlying the proposed change are not tainted, even in part, by an invidious racial purpose; it is insufficient simply to establish that there are some legitimate, nondiscriminatory reasons for the voting change. See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977); *City of Rome, supra*, at 172; *Busbee v. Smith*, 549 F. Supp. 494, 516-17 (D.D.C. 1982); *aff'd*, 459 U.S. 1166 (1983). While we do not in any way question the State's need for or purpose in creating new judgeship positions, we do find ourselves unable to conclude that the State has carried its burden of showing the absence of the proscribed purpose in its insistence on maintaining and expanding the existing dilutive system for electing candidates to those positions, a system that has been found by the court, or our analysis, to be violative of Section 2 of the Voting Rights Act. See, *e.g.*, 28 C.F.R. 51.55(b). Therefore, on behalf of the Attorney General, I must continue the objection to the implementation of the changes enumerated in Attachment A and object to the changes enumerated in Attachment B.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the changes do not have the purpose and will not have the effect or result of denying or abridging the right to vote on account of race or color.

In addition, Section 51.45 of the guidelines permits you to request that the Attorney General reconsider the objections. However, until the objections are withdrawn or a judgment from the District of Columbia Court is obtained, the effect of the objections by the Attorney General is to continue the legal unenforceability of the changes identified in Attachments A and B. See also 28 C.F.R. 51.10.

Because this matter remains pending before the court in *Clark*, we are sending a copy of this letter to the court and counsel of record in that case.

Sincerely,

/s/ John R. Dunne
John R. Dunne
Assistant Attorney General
Civil Rights Division

cc: Honorable John V. Parker
Chief Judge, United States District Court

Michael M. Rubin, Esq.
Fred J. Cassibry, Esq.
Robert G. Pugh, Esq.
Kenneth C. DeJean, Esq.
John N. Kennedy, Esq.
Jack C. Benjamin, Esq.
George A. Blair, III, Esq.
Anthony Skidmore, Esq.
Robert P. McLeod, Esq.
Harry Rosenberg, Esq.
Earnest L. Johnson, Esq.
Robert B. McDuff, Esq.
Ulysses Gene Thibodeaux, Esq.

ATTACHMENT A

Judicial District Court Districts	Objected-to Voting Changes
6th	Act 515 (1974), which creates an additional judgeship and a special election therefor
10th	Act 635 (1979), which redistricts the boundaries of the district
16th	Act 104 (1968), which creates an additional judgeship and a special election therefor
	Act 56 (1984), which creates an additional judgeship (Division G)
20th	Act 34 (1981), which creates an additional judgeship
21st	Act 9 (1974), which creates an additional judgeship and a special election therefor
	Act 56 (1984), which creates an additional judgeship (Division F)
23rd	Act 464 (1968), which creates an additional judgeship and a special election therefor
24th	Act 78 (1968), which creates an additional judgeship and a special election therefor
	Act 674 (1968), which creates an additional judgeship
	Act 503 (1974), which creates two additional judgeships and the special elections therefor

27th	Act 158 (1971), which creates an additional judgeship and a special election therefor
29th	Act 94 (1970), which creates an additional judgeship
	Act 56 (1984), which recodifies the additional judgeship under Act 94 (1970)

Circuit Courts of Appeal	Objected-to Voting Changes
First Circuit, Districts 2 and 3	Act 114 (1975), which creates an additional judgeship in each district and special election therefor and provides an implementation schedule
Section Circuit	Act 114 (1975), which creates an additional circuitwide judgeship
	Act 801 (1987), which creates an additional circuitwide judgeship and special election therefor
Third Circuit	Act 114 (1975), which creates an additional circuitwide judgeship
Third Circuit, Districts 1, 2, and 3	Act 801 (1987), which creates an additional judgeship in each district and special elections therefor
	Act 200 (1987), which changes the special election dates under act 801 (1987)

ATTACHMENT B

Judicial Districts	Voting Changes
24th	Act 8 (1990), which creates an additional (sixteenth) judgeship
26th	Act 174 (1989), which creates an additional judgeship
40th	Sections 3(A) and 3(B) of Act 611 (1989) and Act 608 (1989), which create an additional judgeship position (Division C)
2nd Circuit, Court of Appeal	Act 8 (1990), which creates a ninth judgeship position to be elected by designated Division C in 2nd Circuit District 3; provides for a change in method of election for 2nd Circuit judges from two elected at-large circuitwide and two elected from each district by designated divisions to three elected from each district by designated divisions, except as specified for the incumbent in the at-large position to be converted to the Division C position of Second Circuit District 2; provides that the judgeship position created by Act 801 (1987) will be elected as the designated Division C position from 2nd Circuit District 1; and provides an implementation schedule therefor

[SEAL]

U.S. Department of Justice
Civil Rights Division

Office of the
Assistant Attorney General *Washington, D.C. 20530*

SEP 17 1990

Cynthia Y. Rougeou, Esq.
Assistant Attorney General
P.O. Box 94125
Baton Rouge, Louisiana 70804-9125

Dear Ms. Rougeou:

This refers to your request that the Attorney General reconsider and withdraw the September 23, 1988, and May 12, 1989, objections under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, to the following voting changes for the State of Louisiana:

> Orleans Parish Criminal District Court: Act 236 (1972), which creates an additional judgeship and a magistrate, and act 143 (1975), which creates five additional judges and decreases terms from twelve years to six years;
>
> Orleans Parish Civil District Court: Act 235 (1970), which creates an additional judgeship position (Division J), and Act 129 (1975), which creates five additional judgeships and decreases terms from twelve years to six years.

We received your requests on June 19 and 26 and August 3, 1990; supplemental information was received July 12 and 17, 1990.

This also refers to Act No. 8, S.B. No. 345 (1990), to the extent that it creates the thirteenth and fourteenth at-large judgeships (Divisions M and N) for the Orleans

Parish Civil District Court; and provides an implementation schedule therefor for the State of Louisiana, submitted to the Attorney General pursuant to Section 5. We receive your submission on June 19, 1990; supplemental information was received July 13 and 17, 1990.

At the outset, we note that when the state originally submitted Acts 129 and 143 (1975), the submissions characterized the voting changes as an increase from five to ten judgeship positions for both the civil and criminal district courts in Orleans Parish. Although we asked for clarification of the voting changes effected by these statutes, we have not received your response. Our further analysis, however, indicates the following:

(1) Act 129 recodifies ten judgeship positions, eight of which antedate the state's coverage under Section 5 and one of which received the requisite Section 5 preclearance in 1986. Accordingly, the effect of the September 23, 1988, objection applied only to the tenth judgeship position (Division J) for the Orleans Parish Criminal District Court, a position that was initially created under Act 235 (1970) and recodified by Act 129 (1975).

(2) Act 143 (1975) recodifies ten judgeship positions, seven of which antedate the state's coverage under Section 5. Accordingly, the effect of the September 23, 1988, objection to Act 143 (1975) applied only to three judgeship positions for the Orleans Parish Criminal District Court.

We have carefully reviewed the information you have provided, as well as comments and information from other sources and interested parties. Our analysis indicates that the changes do not have the purpose and will

not have the effect of discriminating on the basis of race or color and that implementation of the changes will not lead to a clear violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973. Accordingly, the objections interposed September 23, 1988, and May 12, 1989, to the specified changes for the Orleans Parish Civil and Criminal District Courts are hereby withdrawn. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.48 and 51.55).

With regard to the changes under act 8 (1990) for the Orleans Parish Civil District Court, the Attorney General does not interpose any objections to the changes in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes. See 28 C.F.R. 51.41.

Sincerely,

/s/ John R. Dunne
John R. Dunne
Assistant Attorney General
Civil Rights Division